No. 91-74

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

BERNEDA R. O'SHEA,

Petitioner,

v.

COMMERCIAL CREDIT CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erroneously applied a state law contract analysis instead of a federal totality of circumstances test to determine the validity of a release of rights under the Age Discrimination in Employment Act?

2. Whether the decision of the Court of Appeals that Mrs. O'Shea ratified the release by retaining severance benefits is inconsistent with the Age Discrimination in Employment Act and the Older Workers Benefit Protection Act?

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COMMERCIAL CREDIT CORPORATION,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Berneda R. O'Shea respectfully petitions the Court for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in *O'Shea v. Commercial Credit Corporation*, No. 90-2374, entered on April 11, 1991.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 930 F.2d 358, and is attached to this petition as Appendix A. The opinion of the district court is reported at 734 F.Supp. 218, and is attached to this Petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

29 U.S.C., § 623;

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

29 U.S.C., § 626;

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this

chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

STATEMENT

Berneda R. O'Shea filed this action in the United States District Court for the District of Maryland against her former employer, Commercial Credit Corporation, under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq., alleging that her employment was terminated because of her age, in violation of the Act. Jurisdiction in the district court was based upon 29 U.S.C. § 1343(a)(4). The district court granted summary judgment in favor of Commercial Credit, on a finding that Mrs. O'Shea had released her claim under the Act through a separation agreement that she signed at the time her employment was terminated. The Court of Appeals affirmed this judgment.

On Friday, August 14, 1987, Mrs. O'Shea, a systems analyst who had been employed with Commercial Credit for more than twenty-seven years, was informed that her employment was to be terminated as part of a work force

reduction. Mrs. O'Shea, who was then fifty-four years old, was a high school graduate who had taken some eleven college credits, as well as various computer related training courses.

At the time she was informed of her termination, Mrs. O'Shea was presented with a document entitled "Separation Agreement," and told that unless she signed and returned it within five days she would lose all of her severance benefits. Those benefits, reflected in the agreement, included severance pay of twenty-seven weeks salary, unpaid leave until the date of her 55th birthday, which would allow her to elect to receive early retirement benefits from the Commercial Credit Pension Plan, and unused accrued vacation pay. The agreement purported to release Commercial Credit from, *inter alia*, "any and all claims relating in any way to the terms, conditions, and circumstances of [Mrs. O'Shea's] employment, whether based on statutory or common law claims, for employment discrimination (including claims of age discrimination). . . . "

According to Mrs. O'Shea, it was her understanding that the severance pay and other benefits afforded her under the separation agreement were standard separation offerings that she was entitled to receive under existing company policy. She had not previously heard that anyone had been required to sign a release in order to obtain these benefits.

Mrs. O'Shea was extremely distraught and upset by her sudden unemployment. She was the sole source of support for two grandchildren who lived with her. She saw her personal attorney on the Monday following her

termination, two days before the deadline for return of the agreement. He declined to advise her because he did not specialize in employment law. She sought the services of another attorney who was not able to advise her without additional information that she did not possess. On the fifth day after her termination, she signed and returned the separation agreement because she believed that she had no alternative and could not afford to lose her benefits.

Mrs. O'Shea was paid her benefits other than severance pay in mid-September 1987. She requested and was granted a deferral of payment of her severance pay until January 1988.

Later in the fall of 1987, Mrs. O'Shea learned that Commercial Credit had hired new analysts in her department, leading her to suspect that age discrimination might have been a motive for her termination. In December 1987, she filed a charge of discrimination with the Equal Employment Opportunity Commission. In August, 1988, Mrs. O'Shea wrote to United States Senator Barbara Mikulski concerning delays in the processing of her charge. In that letter, she stated that she had purposely delayed filing her charge until after receiving her severance benefits.

Commercial Credit was a subsidiary of Control Data Corporation prior to November 1986. The company's policy at that time had been to offer to each employee discharged as a result of a work force reduction one week's pay for each year of service, plus two weeks notice pay. There was an unwritten policy adopted in early 1987 to require employees to sign a release in

exchange for these payments. This policy was reduced to writing in the fall of 1987, after Mrs. O'Shea's discharge.

The district court granted summary judgment in favor of Commercial Credit, holding that the claim was barred by release. It rejected Mrs. O'Shea's contention that there was a dispute of material fact regarding the voluntariness of the release. It held that the release was valid under either a traditional contract analysis or a review of the totality of the circumstances. The court also found that she had ratified the release by retaining the benefits that she received.

On appeal, the Fourth Circuit noted the existence of a split among the circuits as to the test for determining whether a release of ADEA claims is knowing and voluntary. It recognized that the Second, Third and Fifth Circuits apply a more stringent federal "totality of the circumstances" test. However, without enunciating its reasons, it concluded that "the better approach" was to analyze such waivers under ordinary contract principles, as do the Sixth and Eighth Circuits. Applying the law of Maryland concerning these principles, it found that the release was valid. It also held that Mrs. O'Shea had ratified the release by retaining the benefits of the agreement, relying heavily on Mrs. O'Shea's letter to Senator Mikulski as reflecting an intent on her part "to have it both ways."

REASONS FOR GRANTING THE WRIT

There are several reasons why review of this decision is important. As the courts that have applied the totality

of circumstances test have concluded, measurement of releases under ordinary contract principles fails to give proper effect to the values underlying federal anti-discrimination laws. The test chosen by the Fourth Circuit is inconsistent with those values and undermines the effective enforcement of those laws.

Second, the question of how to measure the validity of releases affects numerous cases. Prophylactic releases such as that involved in this case are being used with increasing frequency in work force reductions. Moreover, this issue comprehends not only ADEA claims, but also cases arising under other federal anti-discrimination statutes. Given the frequency of such releases, a unitary test for measurement of their validity should exist nationwide.

Finally, the court's decision that an employee can by ratification validate a release that is otherwise ineffective not only conflicts with other recent authority, but threatens to undermine the effect of a statute recently adopted by Congress to govern such releases.

I.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), this Court "presum[ed]" that an employee might waive his cause of action under Title VII as part of a voluntary settlement if the consent was voluntary and knowing. 415 U.S. at 52. Based on that statement, courts have held that releases are valid under both Title VII and ADEA if voluntary and knowing. *See* App. 7a; *Riley v. American Family Mutual Insurance Company*, 881 F.2d 368, 371 n.7 (7th Cir. 1989) (Title VII); *Stroman v. West Coast Grocery Company*, 884 F.2d 458 (9th Cir. 1989), *cert. denied*, 111

S.Ct. 151 (1990); *Torrez v. Public Service Company of New Mexico, Inc.*, 908 F.2d 687 (10th Cir. 1990); *Coventry v. United States Steel Corporation*, 856 F.2d 514 (3d Cir. 1988).

The circuits are divided, however, over what standard to use in assessing whether a release is knowing and voluntary. The competing tests are: (1) a simple contract analysis under state law and (2) a totality of the circumstances analysis under federal law. The Second, Third and Fifth Circuits have applied a federal totality of the circumstances analysis in ADEA cases. *See Bormann v. AT&T Communications, Inc.*, 875 F.2d 399 (2d Cir.), *cert. denied*, 110 S.Ct. 292 (1989); *Coventry v. United States Steel Corporation*, 856 F.2d 514 (3d Cir. 1988); *O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015 (5th Cir. 1990). The Sixth Circuit and the Eighth Circuit have applied a simple contract analysis, as did the Fourth Circuit in this case. See *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986); *Moore v. McGraw Edison Company*, 804 F.2d 1026 (8th Cir. 1986).

The same division exists in Title VII cases among the Courts of Appeals that have ruled on the issue. *Compare Riley v. American Family Mutual Insurance Company*, 881 F.2d 368, 371 n.7 (7th Cir. 1989), and *Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983), both applying a state law simple contract analysis, with *Stroman v. West Coast Grocery Company*, 884 F.2d 458 (9th Cir. 1989), *cert. denied*, 111 S.Ct. 151 (1990) and *Torrez v. Public Service Company of New Mexico, Inc.*, 908 F.2d 687 (10th Cir. 1990).

As the Fourth Circuit recognized, the choice of which test to apply is significant. Under Maryland law, one who has the capacity to understand a release is bound by it, in

the absence of fraud, duress or imposition. App. 13a. A totality of the circumstances test, however, applies heightened scrutiny, emphasizing several specific factors including: (1) the plaintiff's education and business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, (3) the role of the plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by counsel or had a fair opportunity to consult counsel, and (6) whether consideration given in exchange for the waiver exceeded the employee benefits to which the employee was already entitled by contract or law. App. 7a-8a.

The choice of the test implicates significant factors relating to administration of federal discrimination laws. Although the dictum in *Alexander v. Gardner-Denver, supra,* concerned settlement of actual disputes between parties to such disputes, its more frequent and more doubtful application is to prophylactic devices used by employers prior to the actual assertion of a claim. While application of the contract analysis to arms length bargaining is one thing, its application to the prophylactic release raises several concerns for effective enforcement of the anti-discrimination statutes. Such a practice is fraught with the danger of overreaching. A simple contract analysis does not take into account whether the release is a contract of adhesion. A simple contract analysis forces employees to choose between expected benefits and assertion of a claim, no matter how valid the claim may be. A simple contract analysis, by making releases harder to challenge, will reduce the number of legitimate claims brought under these statutes.

The totality of circumstances test strikes a more appropriate balance in preventing the defeasance of the employees' claim at a time when she or he is most vulnerable and possibly least cognizant of her legal rights. Those rights are more than mere contract rights; their enforcement is a vital subject of public policy. Moreover, under a contract analysis, the standard for the determination of whether important federal rights are waived will depend upon the vagaries of the law of the particular state without regard for the policies underlying the federal Act; the rights provided by Congress under the ADEA and Title VII will therefore apply with greater or lesser force depending upon where the employee is situated.

Thus, the issue posed by this case is closely related to the policies underlying these statutes, and the decision of that issue has significant impact on those policies and the enforcement of the rights granted by those statutes.

The use of the release as a device to foreclose claims in connection with work force reductions is steadily increasing. According to a study conducted by the General Accounting Office, 80% of Fortune 100 companies had sponsored an exit incentive program between 1979 and 1988. An average of 28% of the companies required employees to sign a release of rights to sue the employer as a precondition to receiving enhanced benefits.[1]

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[1] A striking feature of the buy out of liability in a case like the present one is that the release is purchased at no cost to the employer and with no benefit to the employee. Recent cases

(Continued on following page)

Significantly, "[in] 1984, only about 13% of the [surveyed employers] required waivers, while in the two-year period 1987-88, the figure had increased to 35%" Aalberts & Kelly, *Waivers Under the ADEA: An Analysis of the Age Discrimination in Employment Waiver Protection Act of 1989*, 40 Lab. L. J. 739, 739-740 (Dec. 1989).

In 1990, Congress enacted the Older Workers Benefit Protection Act, Pub. L. 101-433, Section 201 of that Act amended ADEA to impose specific criteria for determining whether a waiver or release is knowing and voluntary. Pub. L. 101-433, §201, 104 Stat. 983.[2] 29 U.S.C. §626(f). The release executed by Mrs. O'Shea would not be valid under these criteria.

While the provisions of the Older Workers Benefit Protection Act govern releases executed after October 16, 1990, the large number of employers requiring such waivers and the backlog of cases in the EEOC and the courts guarantee that the issue posed by this case will have continued broad significance. Moreover, while the Act prospectively resolves the issue in the context of the ADEA, it does not resolve the same conflict in Title VII

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such as *Sejman v. Warner-Lambert Co., Inc.*, 889 F.2d 1346 (4th Cir. 1989) (en banc), *cert. denied*, 111 S.Ct. 43 (1990), holding that severance benefits are non-vested under federal law and non-enforceable under state law have been used by employers to transform employees' previously accrued severance benefits into new consideration for a release. By this expedient, the teeth of ADEA can be extracted painlessly by most large employers.

[2] The text of the section is set forth in Appendix C.

release cases. Thus, a resolution of the issue in this case will affect a significant number of cases.

II.

The ratification argument adopted by the Fourth Circuit also raises significant problems. The first is that it conflicts with the reasoning of this court in a decision under the Federal Employers' Liability Act which flatly rejected the claim that the employee must give back the consideration before challenging a release. The second is that it would severely restrict the ability of employees to challenge releases whether valid or not and thereby undermine the purpose of ADEA. The third problem is that it would effectively nullify the waiver provisions of the recently enacted Older Workers' Benefit Protection Act.

In *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968), a case involving the Federal Employers' Liability Act, this Court held that the question of whether a release was subject to challenge where an employee did not offer to return the consideration for the release was governed by federal law. The Court rejected the requirement of a tender back of consideration given in exchange for the release, finding this to be "wholly incongruous with the general policy of the Act." 390 U.S. at 518. Likewise, the holding here that Mrs. O'Shea could ratify an otherwise ineffective release by retaining benefits is inconsistent with the policies underlying ADEA.

The dilemma in which an employee is placed by the allowance of a ratification defense is illustrated by the facts of this case. An employee may well believe, as did

Mrs. O'Shea, that she is entitled to the benefits that she receives under the separation agreement. Nonetheless, the possibility of a ratification defense means that she would have to forego those benefits as the price of asserting her ADEA claim. Asserting such a claim may well be an unaffordable luxury to an individual suddenly without employment who has dependents to support. Thus, the effect of the ratification doctrine, if adopted by other courts, will be to force employees to forego such litigation and to afford employers a device to avoid claims which is even more powerful than releases themselves. "No matter how egregiously releases might violate the requirements of the Older Workers Benefit Protection Act, employees would be precluded from challenging them unless they somehow could come up with the money they were given when allegedly forced into retirement." *Isaacs v. Caterpillar, Inc.*, ___ F.Supp. ___, 56 Empl. Prac. Dec. (CCH) ¶ 40,765, 1991 Westlaw 108029, *7 (C.D. Ill. May 23, 1991).

In contrast to the debate over the proper test for assessing validity of releases, this case is apparently the first in which ratification was applied to an ADEA release. Nonetheless, a conflict has emerged. In *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991), the Fifth Circuit also applied the doctrine of ratification to releases of ADEA rights. However, in *Isaacs v. Caterpillar, Inc., supra*, a district court rejected the holdings in this case and *Grillet*.

The Fourth Circuit's decision is particularly problematic in light of the recently enacted Older Workers Benefit Protection Act which restricts the circumstances under which a waiver of rights under the act may be found knowing and voluntary. App. 20a. Ratification means that

an otherwise voidable release is valid. Neither the text nor the legislative history of OWBPA refers to ratification. "The law of tender is therefore presumably the same after the OWBPA as before it." *Isaacs v. Caterpillar, Inc., supra.* Thus, a release, even if contrary to the Act, will be subject to ratification. Because the application of the rule announced by the Fourth Circuit would render challenges to releases practically impossible, the provisions of the Act will be nullified.

Since ratification is simply a corollary of the contract view of releases, the same conflict that currently exists concerning the test for validity of releases may be expected to develop over the ratification issue. This case furnishes a propitious vehicle to resolve this issue, which so centrally affects the enforcement of this statute.

CONCLUSION

For the reasons stated, it is respectfully prayed that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2374

BERNEDA R. O'SHEA,

Plaintiff - Appellant,

versus

COMMERCIAL CREDIT CORPORATION,

Defendant - Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederick N. Smalkin, District Judge. (CA-89-2293-S)

Argued: October 30, 1990 Decided: April 11, 1991

Before HALL and NIEMEYER, Circuit Judges, and CACHERIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Cacheris wrote the opinion, in which Judge Hall and Judge Niemeyer joined.

ARGUED: W. Michel Pierson, PIERSON, PIERSON & NOLAN, Baltimore, Maryland, for Appellant. Jeffrey Peabody Ayres, VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellee. ON BRIEF: Robert L. Pierson, PIERSON, PIERSON & NOLAN, Baltimore, Maryland, for Appellant. Brenda J. Tranchida, Peter S. Saucier, VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellee.

CACHERIS, District Judge:

The appellant, Berneda R. O'Shea, instituted this action against appellee Commercial Credit Corporation alleging a violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 601 *et seq.* ("ADEA"). On April 3, 1990, the district court, finding no genuine dispute of material fact, granted summary judgment in favor of Commercial Credit, having determined that the appellant signed a valid release of her ADEA rights in an employment termination agreement and, alternatively, that she subsequently ratified that agreement. O'Shea appeals from that decision, and we now affirm.

I.

O'Shea had been employed by Commercial Credit for 27 years as a programmer/analyst before being laid off from work on August 14, 1987. That morning, she had been sitting at her desk when her immediate supervisor,

Barbara Spedalire, came by and asked her to step in to her office. O'Shea did so and was thereupon informed that her position with the company had been terminated. As a result, she began crying hysterically.

Spedalire then handed her a document which, in relevant part, stated that O'Shea would agree to release any claims she might have against her employer in exchange for certain severance benefits. These benefits included: (1) normal base pay through September 11, 1987, (2) all unused, accrued vacation through the last day worked, (3) 27 weeks severance pay, and (4) a "determination" that she would be considered to be on unpaid leave of absence through November 3, 1987. The last of these benefits would serve to bridge her until her 55th birthday and enable her to elect early retirement benefits. Furthermore, the "bridging" plan enabled O'Shea to lose only 42% of her pension as opposed to the 50% she would have lost had she not been bridged. It also resulted in certain insurance advantages.

In return for these benefits, O'Shea agreed to:

> release Commercial Credit . . . to the fullest extent permitted by law, from any and all claims relating in any way to the terms, conditions, and circumstances of [her] employment, whether based on statutory or common law claims, for employment discrimination (*including claims of age discrimination*), breach of contract . . . or [any] other theory, whether legal or equitable.

(Emphasis added.) The document further recited that O'Shea would be given five days to sign and return it or her chance to obtain the aforementioned severance benefits would be lost.

The appellant returned home that day extremely dysphoric and dejected. As the sole source of support for the two grandchildren who live with her, she became very frightened and depressed and spent the entire weekend in a "state of agony."

On the following Monday, August 17, O'Shea consulted with her personal attorney, Joseph Askin, because she wanted to know if the release "was a legal document." He advised her that he did not specialize in employment law and confessed that he was not the appropriate person to help her. She then consulted another lawyer, Jerome Blum, who informed her that he could not assist her until she provided him with additional information which she did not possess at that time. Nevertheless, in a later deposition, she testified that both lawyers had advised her "that they weren't sure that it was legal." O'Shea then discussed the situation with her brother and several close friends, but eventually decided to sign and return the agreement because she saw "no alternative [and] could not afford to lose the benefits set forth in the document."

A few weeks later, Spedalire agreed to a subsequent request made by O'Shea that the severance pay be deferred until January 1988. That agreement was then embodied in a separate document, signed September 9, 1987.

In an affidavit, O'Shea stated that it was her impression that the severance pay (one week's worth for every year's service to the company) and the bridging provision were standard benefits she was "entitled to receive under existing company policy." Moreover, in her deposition, she further stated that neither she nor two other

recently laid-off employees with whom she had discussed the matter had ever heard that the severance benefits would be unavailable unless the terminated employee signed a release.

Dorothy Wade, Commercial Credit's Director of Human Resources, stated that the company had been a subsidiary of the Control Data Corporation until it was spun off in November 1986. Shortly thereafter, in January 1988, new policies were instituted. One of those policies was that employees would not receive severance pay unless they first agreed to sign a form which released the company from all claims. This policy was eventually reduced to writing in the fall of 1987. O'Shea testified that she knew of no persons who had received severance benefits after December 1986 without signing the form.

Some time after she signed and returned the separation document, she was informed by a friend that Commercial Credit had taken out an employment advertisement in the August 16, 1987 edition of the Baltimore Sun newspaper. O'Shea also learned subsequently that the company had hired new analysts in the very department in which she had been working. Accordingly, she pointed out that she had no reason to believe that age discrimination may have been a motive for her termination until after she had already signed the release.

Recently, the appellant described the situation at Commercial Credit in great detail in a very articulate letter that she sent to U.S. Senator Barbara Mikulski. In that letter, she also explained her own personal dilemma and stated that she "purposely avoided [filing an] age

discrimination action" against the appellee until the deferred severance benefits were paid to her.

II.

The issue in this case is whether the release that O'Shea signed, in which she agreed to waive her federal ADEA rights in return for the severance pay and other consideration, was valid under the applicable law. The trial court held that it was.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), the court noted that employees may settle their ADEA claims against employers without EEOC involvement. This has been the consensus of the other circuits which have considered the question. *See O'Hare v. Global Natural Resources, Inc.*, 898 F.2d 1015, 1016 (5th Cir. 1990); *Bormann v. AT&T Communications, Inc.*, 875 F.2d 399, 401-02 (2d Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 292 (1989); *Coventry v. United States Steel Corp.*, 856 F.2d 514, 517 (3d Cir. 1988); *Lancaster v. Buerkle Buick Honda Co.*, 809 F.2d 539, 540 (8th Cir.), *cert. denied*, 482 U.S. 928 (1987); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1043 (6th Cir.) (en banc), *cert. denied*, 479 U.S. 850 (1986).

Nevertheless, the appellant contends that, in view of recent congressional action suspending operation of an EEOC regulation which permits the unsupervised waiver of ADEA claims, courts should "scrutinize . . . very carefully" any release of ADEA rights.[1] Put simply,

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[1] In 1987, the EEOC promulgated a regulation stating that "it has been found necessary and proper in the public interest to permit waivers or releases of claims under the Act without

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O'Shea is inviting this court to accord special significance to acts of Congress which have done no more than leave the law in its nascent state on the issue of unsupervised waivers. We decline that invitation.

There is no dispute among the circuits that employees may validly waive their federal ADEA rights in private settlements with their employers, provided that their consent to a release is both knowing and voluntary. *See also Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974) (Title VII rights presumably may be waived if employee's consent to the settlement was knowing and voluntary). The circuits are split, however, as to the appropriate source of law to be used in assessing the validity of a particular waiver.

The Second, Third, and Fifth Circuits apply a more stringent federal "totality of the circumstances" test, on the grounds that the congressional purpose of eliminating discrimination in employment is better served thereby. *See Bormann*, 875 F.2d at 403; *Coventry*, 856 F.2d at 523; *O'Hare*, 898 F.2d at 1017. Applying the "totality of the circumstances" test, courts have looked to several factors in order to assess the validity of a particular release. These factors include: (1) the plaintiff's education and

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the Commission's supervision or approval. . . . " 29 C.F.R. § 1627.16(c)(1). In appropriations bills from 1988 through 1990, however, Congress has subsequently suspended the operation of this provision. Pub. L. No. 100-202, 1987 U.S. Code Cong. & Admin. News (101 Stat.) 1329-31; Pub. L. No. 100-459, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 2216; Pub. L. No. 101-162, 1990 U.S. Code Cong. & Admin. News (103 Stat.) 1020.

business experience, (2) the amount of time the plaintiff had possession of or access to the agreement before signing it, (3) the role of the plaintiff in deciding the terms of the agreement, (4) the clarity of the agreement, (5) whether the plaintiff was represented by counsel or consulted an attorney, and (6) whether the consideration given in exchange for the waiver exceeded the employee benefits to which the employee was already entitled by contract or law. *Bormann*, 875 F.2d at 403, *quoting EEOC v. American Express Publishing Corp.*, 681 F.Supp. 216, 219 (S.D.N.Y. 1988). The *Bormann* court modified the fifth factor of this test to include "whether an employer encourages or discourages an employee to consult an attorney and whether the employee had a fair opportunity to do so." *Id.* at 403 (citation omitted).

On the other hand, the Sixth and Eighth circuits have agreed that ordinary contract principles should be applied in determining whether a release was knowingly and voluntarily given. *Runyan*, 787 F.2d at 1044, n.10; *Lancaster*, 809 F.2d at 541. Likewise, in *Riley v. American Family Mut. Ins. Co.*, 881 F.2d 368, 371-73 (7th Cir. 1989), the court noted a split both in its own circuit and in others as to which body of law would be most appropriate, but found it unnecessary in the circumstances of that case to "create a distinct body of federal law to interpret a plaintiff's release of federal rights."

We believe that the better approach is to analyze waivers of ADEA claims under ordinary contract principles, and, thus, we adopt the position taken by the Sixth and Eighth Circuits.[2] Accordingly, we turn to the appro-

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[2] The trial judge held that the release signed by O'Shea satisfied both the "totality of the circumstances" test and ordinary contract principles.

priate state's law for guidance: Maryland law recognizes a release to be nothing but an ordinary contract and, accordingly, it provides that a party may set aside a release for the same reasons that it may void a contract. *Parish v. Maryland & Virginia Milk Producers Ass'n*, 261 Md. 618, 692, 277 A.2d 19, 54 (1971), *cert. denied*, 404 U.S. 940 (1971).

There cannot be any doubt that O'Shea's decision to execute the agreement was voluntary, deliberate, and informed. The release unambiguously stated that age discrimination claims would be waived. Moreover, O'Shea also received substantial consideration in exchange for the release.[3] Certainly, there was no fraud perpetrated by Commercial Credit, and any claims of economic duress are rebutted by O'Shea's decision to defer receipt of the severance pay until the following January.

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[3] The appellant contends that the $23,371.20 in severance pay which she received was an entitlement which had already accrued to her and, accordingly, it could not be deemed consideration given for the release. Relying on basic contract principles, she contends that her continued work for the company was done with the expectation that she might eventually receive the severance pay.

In *Holland v. Burlington Industries*, 772 F.2d 1140 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986), however, this court held that severance pay arrangements, whether funded from general assets or from a special trust, were governed by ERISA. Accordingly, the court in *Sejman v. Warner-Lambert Co., Inc.*, 889 F.2d 1346, 1348-49 (4th Cir. 1989) (en banc), *cert. denied*, ___ U.S. ___, 111 S.Ct. 43 (1990), reasoned that "[b]ecause, under ERISA, severance benefits are contingent and unaccrued, an employer may unilaterally amend or eliminate the provisions of a severance plan. . . . "

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III.

In the alternative, we hold that even if the release executed by the appellant was invalid, the appellee would have prevailed on the ground that the appellant's subsequent acceptance of the severance pay demonstrated an intent to ratify the agreement. It is a well-established proposition that the retention of the benefits of a voidable contract may constitute ratification. *See, e.g., In re Boston Shipyard Corp.*, 886 F.2d 451, 455 (1st Cir. 1989) ("It is well-settled . . . that 'a contract or release, the execution of which is induced by duress, is voidable, not void, and the person claiming duress must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so.' ") (citation omitted); *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 420 (8th Cir. 1985) (plaintiff signed a release under threat of losing severance pay, then sued to rescind, claiming duress, and court held for defendant on ground that the employee accepted benefits and thereby ratified the contract).

O'Shea attempted to avoid this result by arguing that she accepted the severance pay because she believed it to

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To the extent, then, that contract principles are implicated, they are entirely preempted by ERISA. In *Holland*, 772 F.2d at 1147, the court relied on the "unparalleled breadth" of ERISA preemption when it held that severance pay matters were exclusively federal concerns.

In sum, O'Shea received approximately $23,000 (not including notice pay and unused, accrued vacation pay) and a "bridging" arrangement, which saved her some pension losses, in consideration for her agreement to waive any ADEA claims that she might have had.

be her entitlement and not because she intended to ratify the agreement. Yet, in the letter she mailed to Senator Mikulski, she stated that she "purposely avoided [filing an] age discrimination action" until she received her severance payment. Clearly, O'Shea sought to have it both ways, and that is something which the doctrine of ratification was designed not to permit.

IV.

In sum, the district judge properly granted summary judgment for the defendant. There were no genuine issues of material fact, and it is clear that Commercial Credit was entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986). O'Shea validly released her ADEA rights under both federal and state law and, moreover, she subsequently ratified the agreement by accepting both the severance pay and the other continuing benefits of the termination package. Accordingly, the opinion of the court below is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BERNEDA R. O'SHEA, Plaintiff and Counterdefendant,	*	
v.	*	Civil No. S 89-2293
COMMERCIAL CREDIT CORPORATION, Defendant and Counterplaintiff.	*	

* * * * * * *

ORDER

For the reasons stated in a Memorandum Opinion entered of even date herewith, it is, this 2nd day of April, 1990, by the Court ORDERED AND ADJUDGED:

1. That judgment BE, and it hereby IS, ENTERED in favor of the defendant and against the plaintiff on the plaintiff's claim-in-chief;
2. That judgment BE, and it hereby IS, ENTERED in favor of the plaintiff and against the defendant on the counterclaim;
3. That costs of this action be awarded to the defendant; and
4. That the Clerk mail copies of this ORDER and of the foregoing Memorandum to counsel.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BERNEDA R. O'SHEA, Plaintiff and Counterdefendant,	*	
v.	*	Civil No. S 89-2293
COMMERCIAL CREDIT CORPORATION, Defendant and Counterplaintiff.	*	

* * * * * * *

MEMORANDUM OPINION

This age discrimination (ADEA) case is before the Court on the motion of the defendant for summary judgment on its claim-in-chief and for partial summary judgment on its counterclaim, as well as plaintiff's motion for summary judgment on the counterclaim. The motions have been fully briefed, and no oral argument is deemed necessary.

Summary judgment is to be awarded in the absence of a genuine dispute of material fact, that is, one as to which the party moved against, were the case in a directed verdict posture, would be entitled to go to the jury under the applicable proof burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). On this record, the defendant is entitled to summary judgment on the claim-in-chief.

First, there is no dispute that plaintiff, although she filed an administrative complaint with the E.E.O.C., failed to file with the Maryland Commission on Human Rights. In an opinion applying the *ratio* of *Oscar Mayer &*

Co. v. Evans, 441 U.S. 750 (1979), to a case indistinguishable in pertinent part from this one, Senior Judge Kaufman of this court recently concluded that an ADEA claimant who does not file with the Maryland Commission is barred from suit. *Scheller v. Hydrotherm, Inc.*, 51 BNA FEP Cases 979 (D. Md. 1989). The Court does not, however, rest summary judgment in this case upon this ground, because there is some authority for the proposition that such failure to exhaust should result only in a non-prejudicial dismissal for the purpose of allowing the initiation of administrative proceedings. *See Oscar Mayer*, 441 U.S. at 759. *But see Cornett v. AVCO Financial Services*, 792 F.2d 447, 450 (4th Cir. 1986).

The defendant is, however, entitled to summary judgment on the defense of release. The undisputed facts show that the plaintiff signed, in August, 1987, a written instrument that specifically released, in clear and unambiguous language, all claims for, *inter alia*, age discrimination, which category of claims was specifically mentioned in the release. The undisputed facts also show that the plaintiff (hardly an unsophisticated laborer, but a computer specialist earning over $40,000 per year) was fully aware of the contents of the release, that it was supported by adequate consideration in the form of severance benefits to which she was not otherwise entitled and that constituted a contemporaneous exchange for the release, that she at all times disputed the merits of her termination, that she was given four or five days (which she took) to decide whether to sign it, and that she consulted *two* attorneys and some close friends before signing it. It is not necessary that she have had a full understanding of all the possible legal bases for suit when she signed the

release, but simply that she have been aware that she potentially had a claim against her employer of some nature, which awareness is certainly attested to by, *inter alia*, her having had the document reviewed by two attorneys. *Cf. Bormann v. AT & T Communications, Inc.*, 875 F.2d 399 (2d Cir. 1989).

Under principles of federal and Maryland contract law applicable to the issue of release, the decision to release federally-protected rights is enforced if the decision was voluntary, deliberate, and informed, *see Bushnell v. Rossetti*, 750 F.2d 298, 302 (4th Cir. 1984). One who has had ample time to read a release and had the capacity to understand it is bound thereby, in the absence of fraud, duress or imposition. *Vincent v. Palmer*, 179 Md. 365, 375 (1941). Under Maryland law, the party attacking the release even on the enumerated grounds has the burden of impeaching it by evidence beyond a preponderance, that is, by evidence that is clear, precise, and convincing to the point of reasonable indubitability, *Gingell v. Backus*, 246 Md. 83, 88-91 (1967), but that does not appear to be the generally-recognized standard applied to release of federally-protected rights. Although some federal cases have taken an "enlightened" totality of the circumstances approach, other federal cases have adhered to a traditional contract analysis, closer to the rule stated in *Bushnell v. Rosetti, supra. See Bormann*, 875 F.2d 399 at 403 (collecting cases). In this case, plaintiff's second thoughts, which resulted in the fullness of time in the filing of this lawsuit, do not even begin to approach the standard set forth even in the "totality of the circumstances" cases such as *Bormann*, and, were this case in a directed verdict posture, would not warrant the submission of the release

question to the jury under the applicable proof burdens. *Anderson v. Liberty Lobby.* Finally, the undisputed facts also show that plaintiff ratified the release, thereby removing any impediment that might theretofore have existed, by accepting and retaining benefits under it. Thus, summary judgment is warranted on the release defense, in defendant's favor. *Anderson v. Liberty Lobby, Inc.*

The Court rejects plaintiff's contention that she is absolutely entitled to go to a jury on the question of the voluntariness of the release. It might be true that she was quite upset over the elimination of her position, but this would not relieve her from the consequences of her voluntary act, under the authority cited above. Especially is this the case where, as here, the potential plaintiff consults with counsel before signing the release. Plaintiff seeks to draw attention away from these consultations on the ground that one of the attorneys she consulted does not consider himself an expert in labor law, and the other thought he did not have time to do a complete analysis. The first attorney properly advised plaintiff to seek a labor expert. If that expert felt he did not have time to do a complete analysis of the situation, he certainly could have advised plaintiff to seek an extension or could have sought one himself, as her counsel. In the event, neither was done. The consequences of this cannot fairly be made to fall on the employer, which gave plaintiff plenty of time to seek competent advice.

The Court rejects the plaintiff's theory that a heightened standard of scrutiny, even beyond that utilized in *Bormann,* ought to be applied to the release in this case simply because it arises in an ADEA context. The persons

protected by the ADEA hardly constitute a traditionally beleaguered minority, in that the class is made up of all persons, regardless of race or sex, over the age of forty. For as long as civilization has existed on this Earth, power in practically all things spiritual and temporal has belonged to this elder class, and the Congress enactment of the ADEA has not made it otherwise. It is they who have the wealth and occupy the jobs, by and large, that make the economy and the government of this country go. These points were ignored by the court in the case upon which plaintiff principally relies, *Coventry v. United States Steel Corp.*, 856 F.2d 514, 521-25 (3d Cir. 1988). Thus, *Coventry* is not persuasive in this regard. (The Court notes that, although the *Bormann* court drew its standard in part from *Coventry*, it did not reach a result consonant with that of *Coventry*.) If *Coventry* were to be rigorously followed, an employer could likely never obtain a release that would serve its intended purpose of *keeping the parties out of court*. An employer would practically be required to provide the employee with a battery of labor lawyers and an unlimited amount of time to deliberate, and would still likely find itself in court before a jury when the employee attacks the release on the ground that it was not "knowingly" and "willingly" executed, as those terms were applied in *Coventry*. Furthermore, the employer would be held to vastly differing standards of law on the release of state and federal claims (because the ADEA does not pre-empt state law claims) arising out of any adverse personnel action. In this Court's opinion, there is no sound reason why a release sufficient under state law and such cases as *Rosetti* and *Bormann*, which this one plainly was on the undisputed facts, ought not to

suffice also under the ADEA. Although there is authority in this District taking a pinched view of the release of *Title VII* claims, *Chastang v. Flynn & Emrich Co.*, 365 F. Supp. 957, 968 (D. Md. 1973), that authority is not persuasive here, for several reasons. First, the release at issue there was (albeit re-executed after the enactment of Title VII) executed in 1946, long before any hint of a claim under any theory of law arose. Second, the release in this case, unlike that in *Chastang*, does not contravene public policy, because public policy must now be seen as embracing the entirely legitimate goal of encouraging non-litigative resolution of disputes, especially as the federal courts become increasingly unavailable to civil litigants as a result of burgeoning criminal trial caseloads. Finally, the enactment of Title VII, the statute at issue in *Chastang*, served the purpose of protecting a traditionally deprived minority, unlike, as detailed above, the vast class of persons protected by the ADEA.

With regard to defendant's counterclaim, summary judgment will be entered thereon in plaintiff's favor. The release did not contain any express language by which plaintiff affirmatively covenanted not to bring suit, nor is there any sufficient basis to imply such a covenant as a contract implied-in-fact. In any event, it is against public policy to penalize by assessment of contract damages, such as legal fees and non-court costs, one who has, in good faith (albeit unsuccessfully), challenged a release. *See, e.g., Wolcott v. Ginsburg*, 697 F. Supp. 540, 547 (D.D.C. 1988). If such a challenge is not made in good faith, the appropriate remedy is a sanction under Fed. R. Civ. P. 11 or a statutory motion for attorney's fees. The Court does

not now make a specific finding on the issue of plaintiff's good faith.

An order will be entered separately, granting summary judgment for the defendant on the claim-in-chief, and for the plaintiff on the counterclaim.

Dated: April 2nd, 1990

/s/ Frederic N. Smalkin
Frederic N. Smalkin
U.S. District Judge

APPENDIX C

101 P.L. 433, Title II, §201, 104 Stat. 983

SEC. 201. WAIVER OF RIGHTS OR CLAIMS.

Section 7 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626) is amended by adding at the end the following new subsection:

"f(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum–

> "(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> "(B) the waiver specifically refers to rights or claims arising under this chapter;
>
> "(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> "(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> "(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
>
> "(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

"(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

"(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

"(H) If a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

"(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

"(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

"(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum –

"(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

"(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

"(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

"(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission."